MOTION FILED
NOV 30 1998

(7)

No. 97-1868

In The

Supreme Court of the United States

October Term, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JOHN E. WARD,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BRADLEY E. WENGER
Counsel and Secretary
ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES
1201 K Street
Sacramento, CA 95814
Telephone: (916) 442-3648
Facsimile: (916) 442-1730

JAMES H. FLEMING
Counsel of Record
FLEMING & PHILLIPS LLP
1340 Treat Blvd., Ste. 630
Walnut Creek, CA 94596-2101
Telephone: (925) 296-2600
Facsimile: (926) 296-2625

Counsel for the Association of California Life and Health Insurance Companies

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

MOTION FOR LEAVE TO FILE BRIEF FOR THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, the Association of California Life and Health Insurance Companies ("ACLHIC") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this *amicus curiae* brief. Counsel for respondent has not consented to the filing of this brief.

ACLHIC is a nonprofit association whose members are domestic California life and health insurance companies and foreign life and health insurance companies which do business in California. One of the primary purposes of ACLHIC is to represent the interests of its members and their policyholders in substantial public policy matters which affect them. ACLHIC has participated as *amicus curiae* in other federal cases for this purpose. ACLHIC has a duty to promote the solvency and efficiency of its members and the soundness of the products they issue.

In the instant case, ACLHIC has a substantial interest in insuring the efficient administration of life, disability and health insurance policies issued to employee benefit plans subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1001, *et seq.* The inefficient interposition in the administration of such plans of disparate state common law rules of statewide, general application, such as the California notice-prejudice rule, is contrary to the express terms of ERISA and to

the prior decisions of this Court. The application of such rules to ERISA plans generally will result in inefficient state-by-state benefit determinations, to the detriment of participants, beneficiaries, plan sponsors and service providers such as the members of ACLHIC. Moreover, the particular common law doctrine in question here – the California notice-prejudice rule – would unpredictably extend liability for tardy claims, prevent the reliable closing of annual accounting periods and provide disparate benefits to plan beneficiaries who reside in different states.

ACLHIC is familiar with the questions involved in the case and the scope of their presentation. ACLHIC believes that additional argument should be presented on one aspect of the legal analysis of the decision below. While petitioner has fully analyzed and briefed the legal issues presented, additional briefing by ACLHIC will assist the Court by demonstrating a significant error of law in the decision below.

It is therefore respectfully requested that the motion of ACLHIC for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

JAMES H. FLEMING
Counsel of Record
FLEMING & PHILLIPS LLP
1340 Treat Boulevard, Suite 630
Walnut Creek, CA 94596
Attorney for Amicus Curiae
Association of California Life
and Health Insurance Companies

December 1, 1998

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1

REASONS FOR REVERSAL 2

I. "Notice-Prejudice" is a Rule of General Application 2

II. The Application of Notice-Prejudice Undermines the Requirement of Adherence to Written Plan Documents and Opens the Door to Disparate Regulation 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098 (1978) 7

Cisneros v. UNUM Life Ins. Co. of America, 134 F.3d 939 (9th Cir. 1998) 2, 6, 7, 8

Conservatorship of Rand, 49 Cal. App. 4th 835, 57 Cal. Rptr. 2d 119 (1996) 4

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) 9

Industrial Asphalt, Inc. v. Garrett Corp., 180 Cal. App. 3d 1001, 226 Cal. Rptr. 17 (1986) 4

In re David C., 152 Cal. App. 3d 1189, 20 Cal. Rptr. 115 (1984) 4

Jersey Shore State Bank v. U.S., 479 U.S. 442 (1986) 5

Johnson-Stovall v. Superior Court, 17 Cal. App. 4th 808, 21 Cal. Rptr. 2d 494 (1993) 5

Lum v. Mission Inn Foundation, Inc., 180 Cal. App. 3d 967, 226 Cal. Rptr. 22 (1986) 5

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 1, 2, 3

People v. Carrera, 49 Cal. 3d 291, 261 Cal. Rptr. 348, 777 P.2d 121 (1989), *cert. denied*, 495 U.S. 911 (1990) 4

People v. Howard, 44 Cal. 3d 375, 243 Cal. Rptr. 842, 749 P.2d 279, *cert. denied*, 488 U.S. 871 (1988) 4

People v. Mayfield, 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485, *cert. denied*, 118 S. Ct. 116 (1997) 5

TABLE OF AUTHORITIES – Continued

Page

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 1, 2, 3, 6, 7, 9

Pioneer Investment Services v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993) 5

Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992) 8

Putnam v. Clague, 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25 (1992) 5

Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993) 7

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982) 3

STATUTES

Employee Retirement Income Security Act ("ERISA"), Section 514, 29 U.S.C. Section 1144 2

OTHER AUTHORITIES

Restatement (Second) of Contracts § 229 4

INTEREST OF THE AMICUS

The Association of California Life and Health Insurance Companies ("ACLHIC") is a nonprofit association whose members are domestic California life and health insurance companies and foreign life and health insurance companies which do business in California.[1] Its interest in the issues presented by the petition is substantial and directly affects its members for the reasons set forth in the foregoing motion for leave to file this brief. Petitioner has consented to the filing of this brief. Respondent has not consented.

The Ninth Circuit's decision in this case conflicts with *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-50 (1987), because, without analysis or explanation, it applies a common law doctrine of general application as if it were a law specifically directed at the insurance industry. The result is to invalidate ERISA benefit plan rules requiring the timely submission of claims and to complicate the administration and increase the expense of such plans, to the ultimate detriment of the plans and their participants.

ACLHIC's members and the plans they serve, as well as the plans' beneficiaries, have a substantial interest in the timely submission and adjudication of benefit claims. Contrary to the orderly administration of benefit plans,

---

[1] Pursuant to Rule 37.6, *amicus* ACLHIC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

permitting late claims by application of the California notice-prejudice rule would open up closed accounting periods and render unreliable the financial results for such closed periods. Benefit plans and their insurers alike will necessarily be obliged to alter their financial planning because the results for a given period will always be in doubt and subject to revision by the resuscitation of untimely claims. Moreover, applying such judge-made doctrines to overrule the clear terms of written benefit plans will undermine the clarity and certainty of the plans in contravention of the expressed intention of Congress.

REASONS FOR REVERSAL

I. "Notice-Prejudice" is a Rule of General Application.

In this action, the Ninth Circuit correctly held that California's common law notice-prejudice rule is within the scope of ERISA preemption as a state law which "related to" an employee benefit plan. ERISA Section 514(a), 29 U.S.C. Section 1144(a). The Ninth Circuit erred, however, in its conclusion that the notice-prejudice rule is a state law regulating insurance which could be "saved" from ERISA preemption under ERISA Section 514(b)(2)(a), 29 U.S.C. Section 1144(b)(2)(a). In this decision, the Ninth Circuit followed its earlier and similarly erroneous decision in *Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939 (9th Cir. 1998).

In *Cisneros*, the Ninth Circuit analyzed *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-50 (1987),

acknowledging that a state law is only saved from ERISA preemption if the law is "specifically directed" at the insurance industry and if it "regulates insurance", 134 F.3d at 944-945.

The Ninth Circuit failed, however, correctly to apply the common sense test of *Dedeaux* in reaching the erroneous conclusion that such a law must be "specifically directed" at the insurance industry. Indeed, the *Metropolitan Life* decision explained that, to be part of the business of insurance, the practice in question must be "limited to entities within the insurance industry". *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 743. *Metropolitan Life* in turn relied upon *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), where the Court refused to accord McCarran-Ferguson protection to a claim adjudication practice, in part because it involved parties outside the insurance industry. Since the goal of Congress was, this Court said, "to protect 'intra-industry cooperation' in the underwriting of risks", a practice which involved non-insurance entities "can hardly be said to lie at the center of that legislative concern". *Pireno*, 458 U.S. at 133.

On examination, it will readily be seen that the notice-prejudice rule is neither "specifically directed" at the insurance industry nor "limited to entities within the insurance industry". Instead, the notice-prejudice rule is one of common application to a wide variety of situations and parties outside the insurance industry, like the practice addressed in *Pireno, supra*.

The notice-prejudice rule simply requires that prejudice must result before failure to give a required notice will work a forfeiture. In short, harmless breaches will be

ignored. A broad expression of this commonplace doctrine may be found in the Restatement (Second) of Contracts, Section 229, as follows:

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Indeed, the requirement that prejudice must result before a failure to perform a contractual condition or to give a required notice will work a forfeiture is a common doctrine in the law of California and has been applied in a wide variety of civil, criminal, family and commercial matters. *See People v. Carrera*, 49 Cal. 3d 291, 261 Cal. Rptr. 348, 777 P.2d 121 (1989), *cert. denied*, 495 U.S. 911 (1990) (failure to give notice of testimony in aggravation of a capital murder sentence harmless where defendant was not prejudiced by lack of notice); *Conservatorship of Rand*, 49 Cal. App. 4th 835, 57 Cal. Rptr. 2d 119 (1996) (failure to give notice of citation to proposed conservatee harmless where no prejudice resulted); *People v. Howard*, 44 Cal. 3d 375, 243 Cal. Rptr. 842, 749 P.2d 279, *cert. denied*, 488 U.S. 871 (1988) (untimely notice of evidence to be used in penalty phase of capital murder prosecution harmless where no prejudice shown); *In re David C.*, 152 Cal. App. 3d 1189, 20 Cal. Rptr. 115 (1984) (failure to give adequate notice of termination of custody of minor child harmless where no prejudice shown); *Industrial Asphalt, Inc. v. Garrett Corp.*, 180 Cal. App. 3d 1001, 226 Cal. Rptr. 17 (1986) (failure to serve statutory notice of mechanic's lien claim ineffective to defeat lien where no prejudice resulted).

Indeed, if anything, notice-prejudice is merely a branch of the broad doctrine of harmless error: in every manner of case and circumstance, excepting only jurisdictional defects, courts disregard irregularities and informalities which do not result in substantial prejudice. Thus, California courts apply the harmless error doctrine to excuse the failure timely to post jury fees where no prejudice is proven. *Johnson-Stovall v. Superior Court*, 17 Cal. App. 4th 808, 21 Cal. Rptr. 2d 494 (1993). Likewise, California ignores the failure to give proper and advisable jury instructions concerning criminal negligence where the failure would not have prejudiced the defendant, given a jury finding of guilt of first degree premeditated and deliberate murder. *People v. Mayfield*, 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485, *cert. denied*, 118 S. Ct. 116 (1997). The failure to make timely service of a civil action has similarly been excused absent a finding of prejudice. *Putnam v. Clague*, 3 Cal. App. 4th 542, 5 Cal. Rptr. 2d 25 (1992). Likewise, informalities in the proof of service of documents are ignored where actual service occurred and no prejudice resulted. *Lum v. Mission Inn Foundation, Inc.*, 180 Cal. App. 3d 967, 226 Cal. Rptr. 22 (1986).

This Court, too, has applied the notice-prejudice rule, and in contexts far removed from the insurance industry. *See Pioneer Investment Services v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) (tardy filing of bankruptcy proofs of claim excused where debtor was not prejudiced by delay); *Jersey Shore State Bank v. U.S.*, 479 U.S. 442 (1986) (third party lender not unfairly prejudiced by government failure to give notice of tax claim).

In *Cisneros, supra,* the Ninth Circuit assumed without analysis that the notice-prejudice rule is directed specifically at the insurance industry. The only authority cited by the Ninth Circuit for the conclusion that the notice-prejudice rule is directed specifically at the insurance industry and is applicable only to insurance contracts is *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 50 (1987). *Dedeaux,* of course, only sets forth the standard that to be regarded as a law which regulates insurance, it must not only have an impact on the insurance industry but must be specifically directed toward that industry. *Dedeaux,* by itself, lends no support for the conclusion that this particular rule is specifically directed at the insurance industry. And while the Ninth Circuit cited *Dedeaux,* it failed to pursue the careful analytical approach of *Dedeaux* in delving in detail into the jurisprudential history of the doctrine in question, which in *Dedeaux* was the availability of punitive damages under Mississippi law. In *Dedeaux,* this Court concluded that:

> "Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law." 481 U.S. 41 at 50.

The same is manifestly true here. The California courts have identified the notice-prejudice law with the insurance industry, but its roots are firmly planted in the general principles of California jurisprudence, both civil and criminal. The doctrine of excuse of minor breach under the rubric "notice-prejudice" has been identified

with and applied to the insurance industry, but the self-same doctrine has also been applied in a myriad of non-insurance contexts, just as the punitive damages law of Mississippi had been applied to many non-insurers. The Ninth Circuit did not attempt, nor could it, to show that the common law doctrine to excuse minor, non-prejudicial contract breaches is one specifically directed toward that industry.

Cases applying the notice-prejudice doctrine to the insurance industry may be found and are cited in the Ninth Circuit opinion in *Cisneros* (*Shell Oil Co. v. Swiss Ins. Co.,* 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815, 845 (1993); and *Clemmer v. Hartford Ins. Co.,* 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098, 1106-1107 (1978)), but such a demonstration is unavailing to answer the essential inquiry of whether the rule is specifically directed toward the insurance industry. What must instead be demonstrated is that the doctrine in question applies only to insurers and not to non-insurance entities. It was evidence that the claims practice in *Pireno, supra,* involved non-insurers which, in part, disqualified Union Labor Life from McCarran-Ferguson protection and it was evidence that the Mississippi punitive damage law applied to non-insurers which required its preemption in *Dedeaux, supra.* Citing instances where a rule of general applicability has been applied to the insurance industry does not make that rule specifically directed at that industry any more than the previous application of punitive damage concepts to insurers made Mississippi's punitive damage law one directed specifically at the insurance industry. The Ninth Circuit's reliance on cases showing that notice-prejudice applies to the insurance

industry was misplaced because the same do nothing to establish that the rule is limited to that industry. As abundantly demonstrated above, there is no such limitation in California or elsewhere. Notice-prejudice is instead commonly applied to a wide variety of parties and legal settings.

II. The Application of Notice-Prejudice Undermines the Requirement of Adherence to Written Plan Documents and Opens the Door to Disparate Regulation.

Judge Posner of the Seventh Circuit cogently observed that "[one] of ERISA's purposes is to protect the financial integrity of pension and welfare plans by confining benefits to the terms of the plans as written. . . ." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126 (7th Cir. 1992). The adoption of notice-prejudice, no less than the recognition of the oral coverage representations of which Judge Posner wrote, would undermine this purpose of ERISA and impair the financial integrity of pension and welfare plans. This is all the more true because, as the Ninth Circuit recognized in the predecessor to this case, *Cisneros v. UNUM Life Ins. Co., supra*, 134 F.3d at 947, there is no uniformity in the methods of applying the notice-prejudice doctrines of the various states. Plan administrators and their insurers, then, will be tasked to award different benefits to different plan beneficiaries, all in ways unpredictable from the terms of the plan document. Further, because the accounting period for any plan can never be considered closed if the financial results may be reopened for late claims which have been revived by notice-prejudice, plans and their insurers will be

unable accurately to determine the costs for a given period and the appropriate rate adjustments for ensuing ones.

In addition, the faulty reasoning of the Ninth Circuit's decision will permit disparate state-by-state rulings on topics far beyond notice-prejudice. Any common law doctrine which has been applied to the insurance industry may, by application of the Ninth Circuit's "analysis", be regarded as one directed at the insurance industry and saved from preemption.[2]

The inevitable result of the Ninth Circuit approach is to save from preemption laws *sometimes* applied to the insurance industry, rather than applied *only* to the insurance industry. This logic will open the floodgate of disparate state regulation and usher in the "patchwork scheme of regulation" which ERISA's broad preemption provision was enacted to eliminate. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987). Instead of attaining ERISA's manifest goal of increased efficiency and reduced costs, plans and plan administrators will be required to pay late claims and, more importantly, to administer plans separately according to the law of each state. This will in turn reduce the affordability of benefit plans and increase the likelihood that benefits will be withdrawn or not offered at all.

---

[2] It is ironic that the Ninth Circuit's approach would demonstrate that the Mississippi law of punitive damages is specifically directed at the insurance industry – after all, it has been repeatedly applied in insurance cases. *Dedeaux, supra*, is a complete answer to this fallacy.

CONCLUSION

In enacting ERISA, Congress intended to encourage the provision of benefits in a cost-effective and efficient manner. As an integral part of that effort, Congress broadly preempted state law. This Court has enforced the determination of Congress that only laws specifically directed at the insurance industry may escape preemption. The law in question here is not so restricted but has been applied in many non-insurance cases and contexts. More importantly, the decision below was reached not by showing that the notice-prejudice doctrine had been applied only to the insurance industry but only that it had sometimes been so applied. To so lower the preemption bar would mean that any law ever applied to an insurer would escape preemption. The entire salutary purpose of Congress in adopting preemption would effectively be thwarted and plans would henceforth be subject to a scheme of patchwork, state-by-state regulation.

The Ninth Circuit's decision should be reversed to advance the goals of Congress to promote efficient, nationwide standards of plan administration and to preserve the availability of plan benefits for plan beneficiaries.

Respectfully submitted,

JAMES H. FLEMING
Counsel of Record
FLEMING & PHILLIPS LLP
1340 Treat Boulevard, Suite 630
Walnut Creek, CA 94596
Attorney for Amicus Curiae
Association of California Life
and Health Insurance Companies

December 1, 1998